FILE COPY

Office Supreme Court, U. S.
FILED
JAN 13 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
a Corporation,

Petitioner,

vs.

H. A. BRASSERT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Petitioner.

LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Of Counsel.

CHICAGO LAW PRINTING CO., 40 S. CLINTON ST. FRANKLIN 6521

SUBJECT INDEX.

PAGE

Petition for writ of certiorari 1
Statement of the case 1-5
Reasons for granting the writ 5-8
Prayer for writ 8

Brief in support of petition 9
I. The opinion of the court below 9
II. Jurisdiction of This Court 10
III. Statement of the case 11
IV. Specification of errors 11-12
Summary of argument 13-14
V. Argument 15
Conclusion 25

Table of Cases Cited.

American Car & Foundry Co. v. Brassert, 61 F. (2d) 162 (C. C. A. 7th) 9

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58, 59 ..... 7, 23

Bailey v. Baker Ice Machine Co., 239 U. S. 268 ..... 6, 17, 18

Burke v. Southern Bell Telephone Co., 42 F. (2d) 742, 743 (D. C. Ala.) 23

Craig v. Continental Ins. Co., 141 U. S. 638 23

Earle & Stoddart v. Ellerman's Wilson Line, 53 Sup. Ct. Rep. 200 23

Evansville v. Chero Cola Co., 271 U. S. 19, 21 20

PAGE

Flink v. Paladini, 279 U. S. 59 ..... 6, 10, 16, 17

Gilbert v. Nat. Cash Register Co., 176 Ill. 288, 294-295 .... 6, 18
Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, 476 ..... 7, 23
Gypsy Oil Co. v. Escoe, 275 U. S. 498 10

Harkness v. Russell, 118 U. S. 663 ..... 6, 18
Hartford Accident Co. v. Southern Pacific, 273 U. S. 207 ..... 8, 20, 24
Hermann v. Mill Co., 69 F. 646, 651 (D. C. Cal.) 23
Interstate Ice Corp. v. U. S. Fire Ins. Co., 243 N. Y. 95, 152 N. E. 476 ..... 6, 18

Lehigh Valley R. Co. v. Jones, 50 F. (2d) 828, 830 (C. C. A. 3d) 21

Morgan's Assignees v. Shinn, 15 Wall (82 U. S.) 105 18

Rivara v. James Stewart & Co., 241 N. Y. 259, 149 N. E. 851, (Aff'd. 274 U. S. 614) 6, 18
Rundell v. LaCampagnie, 100 F. 655, 657 (C. C. A. 7th) .. 7, 23

Stewart & Co. v. Rivara, 274 U. S. 614 (Aff'g. 241 N. Y. 259; 149 N. E. 851) 17

The Boise Penrose, 22 F. (2d) 919, 920 (C. C. A. 2d) 19
The Eddie, 8 F. (2d) 63 (S. D. N. Y.), Aff'd 8 F. (2d) 65 (C. C. A. 2d) 17
The Milwaukee, 48 F. (2d) 842 (D. C. E. D. Wis.) 19, 20
The Muriel, 25 F. (2d) 505 (D. C. Wash.) 15
The Plymouth, 3 Wall. 20, 36 ..... 7, 23
The Wheeler-Shipyard Hull, 1 F. Supp. 402 (D. C. E. D. N. Y.) 20

Wm. W. Bierce v. Hutchins, 205 U. S. 340, 348 ..... 6, 17

PAGE

U. S. CONSTITUTION CITED.

Art. 3, Sec. 2, Cl. 1, U. S. Constitution 10

STATUTES CITED.

28 U. S. C. sec. 347 10
28 U. S. C. sec. 350 10
28 U. S. C. sec. 371 10
46 U. S. C. sec. 183 (R. S. sec. 4283)
.....4, 6, 7, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23

RULES OF COURT.

C. C. A. 7th Cir., Rule 25 10
U. S. Supreme Ct., Rule 38(5) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No.

AMERICAN CAR AND FOUNDRY COMPANY,
a Corporation,

Petitioner,

vs.

H. A. BRASSERT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, American Car and Foundry Company, respectfully represents that it is aggrieved by the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit affirming the decree of the United States District Court for the Northern District of Illinois, Eastern Division, which decree dismissed the libel in admiralty filed in the said District Court by your petitioner.

The libel sought to limit the liability, if any, of your petitioner for damages to respondent's person and property, and to others, resulting from an explosion and fire occurring on August 18, 1930, on the cruiser "Orion", a 38-foot gasoline propelled cruiser, while it was being operated by respondent on the waters of Lake Michigan.

The "Orion" was in the possession of respondent pursuant to a conditional sale contract entered into between your petitioner and respondent, under which ownership of the boat was reserved in your petitioner until the boat was paid for. At the time of the accident the boat had not been fully paid for and the conditions of the conditional sale contract were in full force.

Allegations of the Libel.

The libel (R. 2-14) alleges that American Car and Foundry Company, your petitioner, is engaged in the manufacture and sale of gasoline propelled yachts and cruisers; that in the usual course of business ownership of such boats is retained by American Car and Foundry Company until the purchaser has made payment of the total amount of the purchase price (R. 2); that the respondent, Brassert, entered his written order with petitioner for a cruiser, which order provided that the cruiser was subject only to the warranty against defects in workmanship and material and that the obligation of your petitioner under this or any implied warranty was limited to the replacement at petitioner's plant of parts returned within 90 days following date of shipment, and also provided that title to the cruiser and its equipment should remain in petitioner until fully paid for (R. 3-4); that the cruiser ordered, named "Orion", was shipped to respondent at Chicago and there received by respondent in good order and con-

dition; that the cruiser was of modern design and construction, well suited for the uses represented and intended, and was sturdy, safe and seaworthy (R. 4-5).

The libel sets forth in full the conditional sale agreement (R. 5-9) entered into between petitioner and respondent on June 20, 1930, by the terms of which respondent acknowledged receipt of the boat in good order and condition and agreed to pay petitioner therefor, the sum of $14,039.03 as follows: $3,000 accompanying the order (receipt of which was acknowledged), $4,000 on delivery of the boat, and the balance in one installment of $7,039.03 in 90 days after delivery of the boat, which installment was required to be evidenced by the promissory note of respondent to the order of your petitioner, bearing date of June 20, 1930, and maturing on the due date of said installment (R. 5-6). The conditional sale agreement expressly provided that delivery to and acceptance of the boat by respondent should not vest in respondent any title thereto or right therein until payment by respondent of the balace of the purchase price; that until all obligations of respondent were performed the title to and ownership of the boat should not pass to or vest in respondent, but should remain and be in your petitioner; that respondent was entitled to possession and use of the boat from its delivery but only upon and subject to all the terms and conditions of the conditional sale agreement; and that upon payment in full by the respondent of the purchase price and of all notes issued thereunder and performance by respondent of his several obligations mentioned in the contract and upon payment by respondent to petitioner of the further sum of $1.00, petitioner would execute and deliver to respondent a bill of sale as evidence that the absolute ownership of the boat was vested in respondent (R. 6-7). The contract also provided for the remedies of the

petitioner in the event of default by respondent in performing his obligations under the contract (R. 7-9).

The libel further alleges that on August 18, 1930 the conditional sale agreement was in full force and effect and there was owing to petitioner, as owner, from respondent the said sum of $7,039.03 due 90 days after June 20, 1930, as set forth in the agreement; that on August 18, 1930 while the cruiser was being operated by respondent on the waters of Lake Michigan, at a point about three miles from the shore opposite Fort Sheridan, Illinois, an explosion is alleged to have occurred, followed by fire, and that the cruiser burned to the water's edge, was sunk, and became a total loss; that respondent and two other persons, whose names are unknown, were in the cruiser at the time of the accident; that respondent claims to have suffered personal injuries and damages to certain personal property on the boat (R. 9-10); that all of the injuries and damages to persons on board and damage to property were occasioned and incurred without the privity or knowledge of petitioner, the owner of said cruiser; that the insurer of the cruiser and property on board and other persons who claim to have been on board of the cruiser at the time of the loss may make claim for damages; that all of such damages were occasioned and incurred without the neglect, fault, privity or knowledge of petitioner or its officers or agents (R. 11); and that petitioner is entitled to have its liability, if any, for any such losses and damages limited to the amount or value of the interest of petitioner as owner in said cruiser immediately after said loss, as provided by Section 4283 of the Revised Statutes of the United States (R. 12-14).

Exceptions of Respondent, and Decree of District Court.

The respondent filed exceptions to the libel, alleging, inter alia, that the libel did not disclose that your petitioner was the owner of the boat within the meaning of the United States statutes permitting limitation of liability and prayed that the libel be dismissed (R. 16-17).

The District Court on November 16, 1931 sustained the exceptions and allowed petitioner ten days to amend its libel or stand on same (R. 18). Petitioner elected to stand on its libel and the District Court on November 30, 1931, on motion of respondent, entered a decree dismissing the libel (R. 18).

Appeal to Circuit Court of Appeals.

An appeal was taken by petitioner to the United States Circuit Court of Appeals for the Seventh Circuit (R. 19-22), which affirmed the decree of the District Court on June 24, 1932 (R. 37). On July 14, 1932, petitioner filed its petition for a rehearing (R. 37-65), which was denied by the Circuit Court of Appeals on October 13, 1932 (R. 78).

Reasons for Granting the Writ.

Your petitioner respectfully represents that the Circuit Court of Appeals erred in affirming the decree of the District Court and in its holdings as hereinafter stated, and that there are the following special and important reasons why the petition for a writ of certiorari should be granted:

1. The Circuit Court of Appeals holds that where the conditional vendee of a vessel sold under a conditional sale

contract, reserving ownership in the vendor until the balance of the purchase price is paid, is in possession of and using the vessel pursuant to the terms of such contract, the conditional vendor is not an "owner" within the meaning of Section 4283 of the Revised Statutes (46 U. S. C., Section 183);

(a) In so holding, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by This Court;

(b) The holding that the conditional vendor is not an owner within the meaning of Section 4283 of the Revised Statutes is probably in conflict with the decision of This Court in the case of *Flink* v. *Paladini*, 279 U. S. 59;

(c) The holding is probably in conflict with the decisions of This Court holding that under a conditional sale of property the vendor remains the owner. See *Wm. W. Bierce* v. *Hutchins*, 205 U. S. 340, 348; *Bailey* v. *Baker Ice Machine Company*, 239 U. S. 268.

(d) In so holding the Circuit Court of Appeals has decided an important question of general law, relating to ownership of property sold under conditional sale, in conflict with the weight of authority. See *Gilbert* v. *Nat. Cash Register Co.*, 176 Ill. 288, 294-295; *Rivara* v. *James Stewart & Co.*, 241 N. Y. 259, 149 N. E. 851 (aff'd 274 U. S. 614); *Interstate Ice Corp.* v. *United States Fire Ins. Co.*, 243 N. Y. 95, 152 N. E. 476; *Harkness* v. *Russell*, 118 U. S. 663.

2. In holding that the owner of a vessel can not limit liability under Section 4283 of the Revised Statutes unless the owner is engaged in shipping or maritime commerce, the Circuit Court of Appeals has decided an im-

portant question of Federal law which has not been, but should be, settled by This Court.

3. In holding that an owner of a vessel cannot limit liability under Section 4283 of the Revised Statutes, unless there exists between the owner and those in charge of the vessel the relationship of agency or master and servant, or unless the owner is directly or indirectly connected with the management and control of the vessel, the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by This Court.

4. The Circuit Court of Appeals also holds that, although the loss and damage to respondent occurred upon the waters of Lake Michigan, inasmuch as respondent is predicating his claim against your petitioner for such loss and damage upon alleged negligence on the part of your petitioner in the manufacture and building of the vessel, your petitioner cannot have its liability, if any, limited under Section 4283 of the Revised Statutes.

(a) In so holding the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by This Court.

(b) Such holding is probably in conflict with the decisions of This Court and of the Circuit Court of Appeals of the Seventh Circuit, holding that the jurisdiction of admiralty is determined by the place where the injury occurred, regardless of where the negligent act was done. See *The Plymouth*, 3 Wall 20, 36; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 58-59; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469, 476; *Rundell* v. *LaCampagnie*, 100 Fed. 655, 657 (C. C. A. 7th Cir.).

5. In holding that the only liability which the statute limits is a liability which arises from or grows out of own-

ership, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by This Court.

6. Even though liability could not be limited, the affirmance of the decree dismissing the libel is probably in conflict with the decision of This Court in *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207.

Wherefore, your petitioner respectfully prays:

That a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding said court to certify and send to This Court a full and complete transcript of the record and all of the proceedings in the cause, being Cause No. 4710 in said Circuit Court of Appeals, to the end that said cause may be reviewed and determined by This Court as provided by law, and that your petitioner may have such other and further relief as to This Court may seem appropriate and in conformity with the law.

AMERICAN CAR AND FOUNDRY COMPANY,
A CORPORATION.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Petitioner.

LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No.

AMERICAN CAR AND FOUNDRY COMPANY,
a Corporation,
Petitioner,

vs.

H. A. BRASSERT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in *American Car & Foundry Co.* v. *Brassert,* 61 F. (2d) 162. The opinion also appears at pp. 31-36 of the Record.

II.

Jurisdiction of This Court.

This Court is authorized to issue a writ of certiorari herein under sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., sec. 347), provided application therefor is duly made within three months after the entry of the judgment of the Circuit Court of Appeals, as required by the Act of February 13, 1925 c. 229, sec. 8(a) (28 U. S. C., sec. 350).

The judgment of the Circuit Court of Appeals was rendered June 24, 1932 (R. 37). Under Rule 25 of the Circuit Court of Appeals for the Seventh Circuit, a petition for rehearing may be filed within twenty days after entry of judgment. A petition for rehearing was filed by your petitioner on July 14, 1932 (R. 37-39), and denied by the court below on October 13, 1932 (R. 78). The running of the time within which application for a writ of certiorari may be made to This Court is suspended by the seasonable filing of a petition for rehearing in the court below, *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498.

By the United States Constitution (Art. 3, Sec. 2, cl. 1) the judicial power is extended to all cases of admiralty and maritime jurisdiction, and by the judicial code (28 U. S. C. sec. 371) exclusive jurisdiction of such cases is vested in the United States courts. The construction of R. S. sec. 4283 (46 U. S. C. 183) presents a federal question, to be determined in accordance with the rule of uniformity which has been declared a dominant requirement for admiralty law, *Flink* v. *Paladini,* 279 U. S. 59, 63.

Under Rule 38(5) of This Court a review on writ of certiorari will be granted where there are special and important reasons therefor. There are special and important

reasons why the cause should be reviewed by This Court on writ of certiorari. Those reasons are set forth in the petition (supra, p. 5), and in the interest of brevity will not be repeated here.

III.

Statement of the Case.

This case presents the question as to whether the libel in admiralty filed by your petitioner in the District Court (R. 2-14) states facts sufficient to invoke Section 4283 of the Revised Statutes relating to limitation of liability by the owner of a vessel. Respondent filed exceptions to the libel (R. 16-17) which were sustained by the District Court, and a decree was entered by the District Court dismissing the libel (R. 18). From this decree your petitioner appealed (R. 19-20) to the Circuit Court of Appeals for the Seventh Circuit, where the decree of the District Court was affirmed (R. 37).

The allegations of the libel have been set forth in the petition for certiorari (supra, p. 2), and in the interest of brevity will not be repeated here.

IV.

Specification of Errors.

1. The court below erred in deciding that the conditional vendor of a vessel, possession of which is delivered to the conditional vendee pursuant to the terms of the contract, is not an owner of the vessel within the meaning of R. S. sec. 4283 (46 U. S. C. sec. 183).

2. The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283, unless the owner is engaged in shipping or maritime commerce.

3. The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283 unless there exists between the owner and those in charge of a vessel the relationship of agency or master and servant, or unless the owner is directly or indirectly connected with the management and control of the vessel.

4. The court below erred in holding that since respondent is predicating his claim against your petitioner for the loss and damage suffered by the explosion of the vessel upon alleged negligence in the manufacture of the vessel, your petitioner cannot limit liability under R. S. sec. 4283.

5. The court below erred in holding that the only liability which R. S. sec. 4283 limits is a liability which arises from or grows out of ownership.

6. The court below erred in affirming the decree of the District Court dismissing the libel.

SUMMARY OF ARGUMENT.

1. **Your petitioner was the owner of the vessel "Orion" within the meaning of Section 4283 of the Revised Statutes.**

The truth of the allegations of the libel are admitted by the exceptions filed by respondent.

The libel shows respondent was in possession under a conditional sale contract which reserved ownership in your petitioner and that the contract was in full force at the time of the accident.

The word "owner" is to be taken in its broad and popular sense. It is well settled that the conditional vendor of property remains the owner thereof.

2. **The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283, unless the owner is engaged in shipping or maritime commerce.**

The statute contains no such qualification. Its purpose was to encourage the building of ships, as well as the business of navigation.

3. **The court below erred in holding that an owner of a vessel cannot limit liability under R. S. sec. 4283, unless there exists between the owner and those in charge of the vessel the relationship of agency or master and servant.**

The statute contains no such qualification.

4. The court below erroneously holds that because the theory of respondent's claim against your petitioner is for negligence in constructing the boat there can be no limitation of liability under R. S. sec. 4283.

The jurisdiction of admiralty is determined by the place where the injury was sustained regardless of where the negligent act, if any, may have been done.

5. The court below erred in holding that the only liability which the statute limits is an imputed liability which arises from or grows out of ownership.

The statute covers any liability for loss or damage occurring upon the navigable waters of the United States.

6. Even though liability could not be limited the court below erred in dismissing the libel.

V.

ARGUMENT.

1. Your petitioner was the owner of the vessel "Orion" within the meaning of Section 4283 of the Revised Statutes.

The allegations of the libel (the truth of which are admitted by the exceptions filed by respondent, *The Muriel*, 25 F. (2d) 505), show that on August 18, 1930, respondent was in possession of and operating the cruiser on the navigable waters of Lake Michigan. The cruiser at the time was occupied by respondent and two other persons. An explosion occurred, the cruiser caught fire, was sunk and became a total loss. The libel shows that respondent claims to have suffered personal injury and property damage, and that others claim or may claim damages (R. 10-11).

Respondent was at the time in possession of and using the cruiser under and pursuant to the terms of a conditional sale contract entered into between your petitioner and respondent on June 20, 1930 (R. 5). This contract expressly provided that ownership of the cruiser should not pass to respondent but should be and remain in your petitioner until the respondent had paid the balance of the purchase price of the cruiser and had performed all of his obligations under the contract (R. 6-7). The contract provided that respondent should pay the balance of the purchase price within ninety (90) days and that he should

execute his note therefor (R. 5-6). Pursuant to the contract, respondent did execute his note for the balance, $7039.03, due September 20, 1930. At the time of the explosion the contract was in full force and effect (R. 9-10).

Section 4283 of the Revised Statutes, (46 U. S. C., Section 183) provides as follows:

> "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The statute expressly provides that "the liability of the *owner* of any vessel" may be limited. The words of the statute are clear and unambiguous. No qualifying words are employed to limit the meaning of "*owner*" to any other than the usual, customary legal import of the word itself. The word is not technical and must be taken in its broad and popular sense as held by This Court in *Flink* v. *Paladini*, 279 U. S. 59. In that case Flink suffered an injury on a tugboat belonging to A. Paladini, Inc., a California corporation. He sued the corporation and its stockholders, seeking to hold the latter under the California laws, which provided stockholders should be personally liable for the debts and liabilities of the corporation. It was contended that the stockholders of the corporation were not the owners of the boat and that their liability was an independent

one voluntarily assumed by contract. This Court held that the stockholders were owners and could limit their liability.

If the word "owner" can be held to include stockholders of a corporation, then certainly it must include within its meaning the vendor in a conditional sale, since it is well recognized that the vendor under a conditional sale contract, such as the contract in the case at bar, remains the owner subject to the vendee's right to acquire title by complying with the stipulated conditions of the contract, *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 271. To hold, as does the court below (R. 35-36), that there is a difference destroys "the uniformity which has been declared a dominant requirement for admiralty law," *Flink* v. *Paladini*, 279 U. S. 59, 63.

Needless to say, there is nothing peculiar to the property right in a vessel making inapplicable to a conditional sale thereof the well settled principles respecting the ownership of personal property sold under conditional sale. Conditional sales of vessels have been recognized by This Court and by other circuit courts of appeal; *Stewart & Co.* v. *Rivara*, 274 U. S. 614 (Affirming 241 N. Y. 259; 149 N. E. 851.); *The Eddie*, 8 F. (2d) 63 (S. D. N. Y.), affirmed 8 F. (2d) 65 (C. C. A. 2d).

The Circuit Court of Appeals in its opinion holds that the delivery of possession to the conditional vendee and the giving by the conditional vendee of a note for the unpaid balance of the purchase price, as required by the contract, destroys the right of the conditional vendor to claim ownership. This Court has expressly held the contrary with respect to conditional sales of property, *Wm. W. Bierce* v. *Hutchins*, 205 U. S. 340, 348; *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 272, 273.

The Circuit Court of Appeals holds (R. 35) that the sixth paragraph of the conditional sale agreement makes the contract simply security for the unpaid note. The sixth paragraph gave to the vendor certain privileges (R. 6-7). If it could be said the exercise of such privileges would have been inconsistent with an assertion of ownership by the vendor, it is sufficient answer that the privileges were not exercised, and the privileges given by that paragraph were manifestly not intended to nullify the express words of the contract concerning ownership, *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268 at p. 273.

The holding of the Circuit Court of Appeals that the contract was in effect a mortgage is also in conflict with the weight of authority, *Gilbert* v. *Nat. Cash Register Co.*, 176 Ill. 288, 294-295; *Rivara* v. *James Stewart & Co.*, 241 N. Y. 259, 149 N. E. 851 (aff'd 274 U. S. 614); *Interstate Ice Corp.* v. *United States Fire Ins. Co.*, 243 N. Y. 95, 152 N. E. 476; *Harkness* v. *Russell*, 118 U. S. 663, where This Court, after a full examination of the adjudged cases, recognized the general rule, that—as between the parties to a conditional sale—where the buyer is bound to do anything as a condition on which the passing of the property depends, the property will not pass until the condition be fulfilled even though the goods may have been delivered into the possession of the buyer.

That the provisions of the contract stamp it unmistakably as a contract of conditional sale and not a mortgage is clear. Nor does the case of *Morgan's Assignees* v. *Shinn*, 15 Wall (82 U. S.) 105, cited by the Circuit Court of Appeals in its opinion (R. 35) hold the contrary. In that case Kelly, being a one-fourth owner of a vessel, made a bill of sale of his one-fourth interest to Shinn. Morgan's assignees brought suit against Shinn to enforce contribution for repairs to the vessel, averring Shinn was the

owner of one-fourth part of the vessel. Shinn denied this averment of ownership and asserted in his answer that the bill of sale was in fact a mortgage given to secure him for a sum of money agreed to be lent by him to Kelly. The court said, p. 109,

> "We think the averment of the answer that the bill of sale was intended by the parties to be only a security, is sufficiently proved. The testimony of Shinn himself is positive. It is confirmed by that of the scrivener, and the testimony of both is entirely uncontradicted."

In support of its holding that a conditional vendor is not an owner, the Circuit Court of Appeals in its opinion (R. 35) says that the vendors of a vessel under a conditional sales agreement are not liable as owners for loss of freight or for repairs or supplies furnished to the vessel. Cases so holding have no bearing upon the question at bar. The basis of liability or non-liability for repairs or supplies furnished to the vessel when the owner is not in possession depends solely upon whether or not the person in possession is the agent of the alleged owner and authorized to bind him by contract, in which respect there is no difference between cases of conditional sales and mortgages, *The Boise Penrose*, 22 F. (2d) 919, 920, (C. C. A. 2d).

In support of our contention that a conditional vendor is an owner within the meaning of R. S. sec. 4283, we call the Court's attention to the case of *The Milwaukee*, 48 F. (2d) 842 (D. C. E. D. Wis.), referred to by the court below in its opinion (R. 36). In that case the Grand Trunk Milwaukee Car Ferry Company was permitted to limit its liability as owner of the car ferry Milwaukee, although the

evidence showed that an agreement had been entered into between the Ferry Company and the Grand Trunk Railroad Company to sell the ferry to the Railroad Company. The agreement was subject to the approval of the Interstate Commerce Commission and was, therefore, conditional. The court in that case pointed out (48 F. (2d) at page 844) that if the case were before the court upon an ordinary proceeding charging the Ferry Company as owner of the boat it would be difficult for the Ferry Company to evade or avoid claim of ownership. In that case the vendor was in possession, but upon the construction of the statute it supports the claim of your petitioner that it is an "owner" within the meaning of the statute.

2. The court below erred in holding that the owner of a vessel cannot limit liability under R. S. sec. 4283, unless the owner is engaged in shipping or maritime commerce.

The statute (R. S. sec. 4283, 46 U. S. C. sec. 183) does not provide that the owner of a vessel in order to limit liability thereunder must be engaged in shipping or maritime commerce. The Circuit Court of Appeals, however, says obviously that was the purpose of the statute (R. 34).

The purpose of the statute was to promote the building of ships, to encourage the business of navigation, *Evansville Co.* v. *Chero Cola Co.*, 271 U. S. 19, 21; "to encourage shipbuilding and to induce the investment of money in this branch of industry", *Hartford Accident Co.* v. *Sou. Pacific*, 273 U. S. 207, 214; see also *The Wheeler-Shipyard Hull*, 1 F. Supp. 402, 406, (D. C. E. D. N. Y.)

The libel alleges that your petitioner during several years last past was, and now is, engaged in the manufac-

ture and sale of gasoline propelled yachts and cruisers, and that in the usual course of business after delivery to the purchaser, ownership of such boats so manufactured is retained by your petitioner until the purchaser has made payment of the total amount of the purchase price (R. 2). Your petitioner, as a builder of ships, thus squarely comes within the purpose of the statute. The statute nowhere restricts the right of an owner to limit his liability to losses resulting from his engaging in shipping or maritime commerce, but generally, in given circumstances, accords him the right to limit his liability for losses purely maritime. Compare *Lehigh Valley R. Co.* v. *Jones,* 50 F. (2d) 828, 830 (C. C. A. 3d).

3. The court below erred in holding that an owner of a vessel cannot limit liability under R. S. sec. 4283, unless there exists between the owner and those in charge of the vessel the relationship of agency or master and servant.

The Circuit Court of Appeals says (R. 35) that your petitioner had nothing whatever to do either directly or indirectly with the management, operation or control of the boat and hence concludes that there was no such relationship between your petitioner and respondent, who was in possession of and using the boat, as to permit your petitioner to claim limitation of liability.

The right of the "owner" of a vessel to limit liability under R. S. sec. 4283, 46 U. S. C. sec. 183, is not made to depend upon the relationship between the owner and those in charge of the vessel, either by any words in the statute or by its purpose (see discussion of purpose of the statute under Point 2, supra.).

Moreover, the Circuit Court of Appeals overlooked the fact that the operation and use of the boat by respondent was under and pursuant to the terms of the conditional sale contract (R. 6-7).

4. The court below erroneously holds that because the theory of respondent's claim against your petitioner is for negligence in constructing the boat there can be no limitation of liability under R. S. sec. 4283.

Neither the libel nor the exceptions thereto show that any suit has been commenced at law against your petitioner, although it is so stated to be the fact by the Circuit Court of Appeals in its opinion (R. 32, 36). The fact that a suit had been commenced by respondent was called to the court's attention by respondent in its brief in the Circuit Court of Appeals and upon oral argument. In the petitioner's petition to the Circuit Court of Appeals for rehearing (R. 60), we pointed out that if respondent wished to avail himself of any such facts they should be set up by way of answer to the libel. We do not deny, however, that a suit at common law has been brought by respondent against your petitioner.

The Circuit Court of Appeals does *not* hold that your petitioner cannot invoke limitation of liability under R. S. sec. 4283 because a common law suit is pending but holds that because respondent is predicating his suit against your petitioner upon negligence in the manufacture and building of the vessel, therefore, liability cannot be limited under the statute (R. 36).

The libel shows (R. 10) and the facts stated in the opinion of the Court of Appeals show (R. 31) that the damage claimed to have resulted to respondent's person and property was by reason of an explosion occurring on the boat

while it was being operated upon the waters of Lake Michigan.

The jurisdiction of admiralty to entertain the libel is determined by the place where the injury was sustained, regardless of where the negligent act, if any, which resulted in the explosion may have been done; *The Plymouth*, 3 Wall 20, 36; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469, 476; *Rundell* v. *La Campagnie*, 100 F. 655, 657 (C. C. A. 7th); *Hermann* v. *Mill Co.*, 69 Fed. 646, 651; *Burke* v. *Southern Bell Telephone Co.*, 42 F. (2d) 742, 743.

Respondent's suit at law against your petitioner is not for breach of contract but in tort alleging negligence in construction, equipment and inspection of the vessel (so stated by the Court below in its opinion, R. 32, 36). The negligence asserted does not change the *maritime* nature of the *liability*, if any, of your petitioner.

5. The court below erred in holding that the only liability which the statute limits is an imputed liability which arises from or grows out of ownership (R. 34, 36).

The statute (R. S. sec. 4283) does not create liability. It limits liability. *Any* liability for a tort occurring on the navigable waters of the United States may be limited, unless done, occasioned or incurred with the privity or knowledge of the owner.

If the owner be a corporation the privity or knowledge of a mere employee will not be imputed to the corporation and liability, if any, may be limited, *Craig* v. *Continental Insurance Co.*, 141 U. S. 638; *Earle & Stoddart* v. *Ellerman's Wilson Line*, 53 Sup. Ct. Rep. 200. In that sense imputed liability can be limited.

It does not follow that the only liability which may be limited is an imputed liability which grows out of ownership. Admiralty would have jurisdiction of a libel against your petitioner by respondent for the damage claimed (see authorities cited under Point 4, supra). If so, petitioner, as owner, may invoke limitation of liability under the statute, whether the theory of respondent's claim be against your petitioner because of ownership, or because of delivering to respondent, as conditional vendee of petitioner, a vessel negligently constructed.

6. Even though liability could not be limited, the court below erred in dismissing the libel.

The libel not only alleges that respondent is claiming damages to his person and property as a result of the explosion and fire (R. 10), but that two other persons were with respondent on the cruiser at the time of the accident and that your petitioner is informed and believes that these persons, and other persons or corporations who are insurer of the cruiser and property on board, all make or may hereafter make claim for damages against your petitioner (R. 10-11). The libel prayed for complete relief (R. 13-14).

Even though the Circuit Court of Appeals was of the opinion liability could not be limited, it should have reversed the case with directions to the District Court to proceed to adjudicate all claims coming from the accident. *Hartford Accident Co.* v. *Southern Pacific*, 273 U. S. 207.

CONCLUSION.

We respectfully submit that the libel states facts sufficient to invoke the limitation of liability statute, and the decision of the court below should be reviewed by This Court in order that the uniformity of admiralty law may be preserved.

Respectfully submitted,

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
JOHN R. COCHRAN,
Proctors for Petitioner.

LEONARD F. MARTIN,
PAUL R. CONAGHAN,
Of Counsel.